ATTACHMENT 5

FRECK, SUSAN

From: SCHEER, JERRY
Sent: Wednesday, January 13, 1999 5:12 PM
To: VAN HOLT, KEITH; ROEDER, ALLAN; MORRIS, WILLIAM; LAMM, DONALD; MUNOZ, ERNESTO; ULLMAN, MURIEL; VALANTINE, PERRY; FRECK, SUSAN; DAROCA, ANDREA
Subject: Surplus Real Property - Hamilton St./Park Bonds

To All: I have again spoken with outside bond counsel, Stan Wolcott. I am satisfied that the sale of the subject property may proceed. I anticipate receipt of Mr. Wolcott's opinion report in a few days and I will provide everyone with a copy of same for your file. There is no need to wait for the report as it will simply document the conclusion reached by Mr. Wolcott and provide the findings which support his legal opinion. Jerry.....

20

RUTAN & TUCKER, LLP
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
611 ANTON BOULEVARD, SUITE 1400
COSTA MESA, CALIFORNIA 92626-1998
DIRECT ALL MAIL TO: P. O. BOX 1950
COSTA MESA, CALIFORNIA 92628-1950
TELEPHONE (714) 641-5100
FACSIMILE (714) 546-9035
INTERNET www.rutan.com

January 14, 1999

Mr. Jerry Scheer
City Attorney
City of Costa Mesa
P.O. Box 1200
Costa Mesa, CA 92628-1200

Re: City of Costa Mesa, $3,910,000 1974 Open Space Bonds

Dear Mr. Scheer:

Pursuant to your request, I retrieved our file for the above issue in which we acted as bond counsel in early-1974. These bonds were issued pursuant to Ordinance No. 73-40, which was passed and adopted by the City Council of the City of Costa Mesa on November 19, 1973.

You have asked us to address the following questions:

1. May the City of Costa Mesa sell a portion of the open space property acquired from the proceeds of the bonds?

2. Are there any particular restrictions on the use of the sale proceeds?

As to the first question, unlike Certificates of Participation and other types of financings in which there is a security interest in the project, general obligation bonds are instead secured by the ad valorem property tax within the City. Thus, there is no lien or other security interest in any particular portion of the facilities financed by the bonds which would need to be released prior to the sale thereof.

With regard to question no. 2, we first examined whether or not the sale of the property would trigger any of the remedial actions required under the so-called "change in use" regulations under the Internal Revenue Code of 1986. Since the property in question was acquired for approximately one percent of the original size of the issue, the City's sale of this property into the private sector would not cause the outstanding bonds to become "private activity bonds" as that term is used under the Code or under its predecessor, the Internal Revenue Code of 1954. Thus, it is unnecessary for the City to use the proceeds from the sale for the defeasance and/or redemption of a pro rata portion of the bonds.

We also reviewed the California Government Code to determine whether or not there were any provisions which might govern the disposition of facilities financed by general obligation bond issues. The only section even remotely bearing on this question is Government Code Section 43628, which governs the disposition of unused proceeds of the bonds themselves. This section might be construed to reach "after acquired" proceeds of the bonds in instances such as this, where the original facilities financed are sold prior to the final maturity of the bonds. If Section 43628 were construed in this fashion (which would be purely by implication, since there is nothing specific in the section addressing this question), at most, the City might be required to deposit an amount equivalent to the original acquisition costs ($43,000) in the Interest and Redemption Fund established in Section 8 of Ordinance No. 73-40.

The application of a portion of the bond proceeds in this fashion would certainly address any question as to the propriety of the disposition of the sale proceeds in terms of unwinding the acquisition of the property as if it never occurred. It also has the salutary benefit of reducing the tax burden on the property owners within the City by an equivalent dollar amount. As I mentioned to you, there is a line of cases in California which states that through the passage of bond measures, such as the two measures which authorize the 1974 Open Space Bonds, creates an "implied contract" running between the voters and the City to utilize the proceeds in the manner described in the bond measure. Although the bond measures did not specifically mention the sites to be acquired, the use of at least a portion of the sale proceeds to "reimburse" the Interest and Redemption Fund would seemingly ameliorate any theoretical "breach" of this implied contract.

In summary, we do not see any impediment to the sale of the Hamilton Street property and the utilization of the proceeds of the sale for any purpose otherwise authorized by law. We are advised that you have already complied with the provisions of the Government Code which require the City to first offer the property to other public entities and that these other public entities have declined the offer of first refusal. This being the case, we are of the opinion that the City of Costa Mesa is now in a position to sell the property and utilize the proceeds for other public purposes. As noted, however, the City may wish to consider depositing the amount of $43,000 into the Interest and Redemption Fund for these bonds to remove any potential issue regarding overtaxation or the breach of the implied contract with the voters.

I believe that covers all of the questions that you wished us to address, but should you have any further questions, please feel free to call me at (714) 641-3421 or fax to me a communication at (714) 546-9035.

Sincerely,

Stan Wolcott

Stan Wolcott

SW/cls
Enclosure (Original file)